

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HECTOR LUNA, JULIAN GARCIA,
FRANCISCO JAVIER LORENZO,
SANTOS MALDONADO, PATRICIA
WOODARD and BARTOLO NUNEZ
individually and on behalf of others
similarly situated,,

Plaintiff,

v.

DEL MONTE FRESH PRODUCE
(SOUTHEAST), INC.,

Defendant.

CASE NO. 1:06-cv-2000-jec

**PLAINTIFFS' MOTION AND INCORPORATED MEMORANDUM
OF LAW FOR LEAVE OF COURT TO FILE
THIRD AMENDED COMPLAINT**

COME NOW named Plaintiffs Hector Luna, Julian Garcia, Francisco
Javier Lorenzo, Santos Maldonado, Patricia Woodard and Bartolo Nuñez
who respectfully move this Court pursuant to Federal Rule of Civil
Procedure 15(a)(2) for leave to file their Third Amended Complaint,

attached to this motion as Exhibit 1. In support of this motion, Plaintiffs state the following:

1. Plaintiffs, migrant and seasonal agricultural workers and H-2A agricultural guest workers, filed their original class action Complaint in U.S. District Court for the Southern District of Florida on April 20, 2006, alleging that Defendants violated their rights under the Fair Labor Standards Act (FLSA), the Agricultural Worker Protection Act (AWPA), and their federally-regulated employment contracts.

2. On August 24, 2006, this case and its attendant pleadings were transferred, by consent of the parties, to this Court.

3. On October 11, 2006, the Plaintiffs filed their First Amended Complaint after obtaining leave of the Court. Rec. Doc. 54; Rec. Doc. 55.

4. On January 8, 2007 the Plaintiffs filed their Second Amended Complaint with leave of the Court. Rec. Doc. 105; Rec. Doc. 106.

5. The Plaintiffs now seek leave to file their Third Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2).

7. Plaintiffs wish to amend their complaint to reflect the Court's denial of their motion for certification of a Rule 23 class action. Rec. Doc. 277.¹

8. Plaintiffs also seek leave to amend their complaint to reflect the joinder of fifty-two (52) individuals, formerly absent members of the putative classes the Court declined to certify on March 3, 2009. Rec. Doc. 277 at 27. The individuals Plaintiffs seek to join are already participating in this matter as opt-in Plaintiffs in the Count III Fair Labor Standards Act collective action. Plaintiffs seek to join them as Plaintiffs in the Count I contract claims and in the Count II claims under the Migrant and Seasonal Agricultural Worker Protection Act as well. Plaintiffs have filed a companion Motion for Permissive Joinder with this motion for leave to amend. "A motion to amend a complaint to add a party also may implicate Rules 20 and 21, the joinder rules. Once a responsive pleading has been served, however, the standard for adding a party is the same regardless of the rule under which the motion is made: the decision lies within the discretion of the court." *Liberty Mut. Ins. Co. v. Hurricane Logistics Co.*, 216 F.R.D. 14, 16 n. 5 (D.D.C. 2003) (internal citations omitted). Plaintiffs' Motion for

¹ Plaintiffs' amendment should not be misconstrued to abandon their petition for permission to appeal this decision pursuant to Fed. R. Civ. P. 23(f), filed at the U.S. Court of Appeals for the Eleventh Circuit on March 17, 2009.

Permissive Joinder and accompanying briefing set forth the propriety of permissive joinder in this case.

9. Defendants will not be prejudiced by the proposed amendments because a nine-month period of merits discovery is scheduled to begin on the May 7, 2009 date of this filing. Rec. Doc. 283 at 3. As no merits discovery has yet been conducted in this case, Defendants are not prejudiced by the addition of parties.

10. Federal Rule of Civil Procedure 15(a) dictates that leave to amend a complaint “shall be freely given when justice so requires.” In the Eleventh Circuit, leave to amend is liberally granted: “Where a plaintiff seeks leave of the court to amend his pleadings, pursuant to Fed.R.Civ.P. 15(a), this court has held that absent prejudice to the defendant, bad faith or undue delay on the part of the plaintiff, it is an abuse of the court’s discretion to deny leave to amend.” *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 (11th Cir. 1987).

11. Plaintiffs seek to amend their complaint in good faith and without undue delay, given that their motion for a class action was denied only recently and Plaintiffs could not have known whether they should move to join the Opt-in Plaintiffs as parties to the Rule 23 claims until after the Rule 23 motion was decided . Plaintiffs tender their Third Amended

Complaint within sixty-five days of the Court's Order denying class certification, and only after an agreed-upon stay of discovery during which the parties unsuccessfully attempted settlement of all claims. Rec. Doc. 277; Rec. Doc 283.

WHEREFORE, the Plaintiffs respectfully request that the Court grant their Motion for Leave of Court to File Third Amended Complaint.

Respectfully Submitted,²

/s/ Andrew H. Turner

Andrew H. Turner *pro hac vice*

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² Pursuant to L.R. 7.1D, the undersigned certifies that this pleading complies with the font and point selections permitted by L.R. 5.1B. This Motion was prepared using the Times New Roman 14 point typeface.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on **May 7, 2009** electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record for the Defendants:

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